# Millenium Medicare Services v Nagadevan a/l Mahalingam

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–584 OF 2007
TEO SAY ENG JC
10 DECEMBER 2012

*Contract — Terms — Construction — Restraint of trade clause — Plaintiff claimed defendant had breached clause — Whether clause was void and unenforceable — Whether Exception 2 of s 28 of the Contracts Act 1950 would apply — Whether partnership agreement was made upon or in anticipation of dissolution of partnership — Whether territory limit imposed by clause in agreement was reasonable — Contracts Act 1950 s 28*

*Partnership — Termination — Dissolution — Whether partnership agreement was made upon or in anticipation of dissolution of partnership — Partnership Act 1961 ss 34, 35, 36 & 37*

*Words and Phrases — 'Dissolution of partnership' — Meaning of*

The defendant, a registered medical practitioner, had entered into a partnership agreement with the plaintiff, a partnership running the business of a health care centre. It was an express term of the agreement, which commenced on 1 November 2006, that the defendant as a partner would not practise as a medical practitioner by setting up any medical practice by himself or as a partner or as an employee within the radius of 15km from any of the plaintiff's branches within three years after he had ceased to be a partner of the plaintiff. On 5 February 2007, the defendant handed his letter of resignation and withdrew as a partner of the plaintiff with effect from 5 May 2007. Sometime in April 2007, the defendant had stopped working for the plaintiff and was practising as a medical practitioner in another clinic, which was within the radius of 15km from one of the plaintiff's branches. The plaintiff filed the present action against the defendant. By way of this action the plaintiff sought a permanent injunction to restrain the defendant from practising as a medical practitioner within the 15km radius from the plaintiff's three branches in Johor and damages. As the date of the trial was fixed after 4 May 2010, the plaintiff's prayer for a permanent injunction became irrelevant and the relief was restricted to the plaintiff's claim for damages. It was the plaintiff's contention that the defendant had breached the restraint of trade clause in the partnership agreement. The defendant submitted that the restraint of trade clause was void and unenforceable as it contravened s 28 of the Contracts Act 1950 ('the Act').

In its reply the plaintiff submitted that the agreement fell under Exception 2 of s 28 of the Act, in that the agreement was made upon or in anticipation of the dissolution of the partnership. However, the defendant argued that exception 2 of s 28 of the Act did not apply to the present case where a single partner left the partnership and the partnership still continued.

**Held**, dismissing the plaintiff's claim with costs of RM8,000:

(1) Exception 2 to s 28 of the Act was meant to cover only two situations, ie upon the dissolution of a partnership or in anticipation of the dissolution of a partnership. Whether the agreement was made upon or in anticipation of the dissolution of the partnership was a question of fact to be determined on the evidence adduced. The literal meaning of the phrase 'dissolution of partnership' was the official ending of a partnership. It was also clear that ss 34–37 of the Partnership Act 1961 only provided four situations where a partnership could be dissolved and that these provisions did not cover a situation where a partner left a partnership and the other partners remained and the partnership continued. In the circumstances, the plaintiff's interpretation of the phrase 'dissolution of the partnership' was not acceptable. Even if the phrase 'dissolution of partnership' could give rise to two interpretations, as contended by the plaintiff' the interpretation which was favourable to the defendant should be adopted (see paras 23 & 31).

(2) The plaintiff's submission that when a partner entered into a partnership he ought to anticipate that it would continue or dissolve in the future was totally without merit. Further, a perusal of the evidence showed that the purpose of the agreement was to admit the defendant as a working partner of the partnership practice. There was neither any discussion between the plaintiff and the defendant of any possibility of the partnership being dissolved in the near future nor any specific clause in the agreement, which dealt with the dissolution of the partnership practice. The agreement only dealt with the termination of the agreement between the plaintiff and the defendant but not the dissolution of the partnership. Further, the plaintiff had failed to plead facts that the parties had entered into the partnership agreement in anticipation of the dissolution of the partnership practice either in its statement of claim or in its reply to the defence. Neither had the plaintiff adduced sufficient evidence to prove that such an agreement was entered into upon or in anticipation of the dissolution of the partnership practice. Therefore, on this ground alone the plaintiff's claim was unsustainable (see paras 30, 39–41).

(3) Although the territory limit imposed by the restraint of trade clause in the agreement was reasonable, being reasonable by itself was not enough to invoke exception 2 to s 28 of the Act. It should be satisfied that the

agreement which contained the restraint of trade clause was made upon or in anticipation of the dissolution of the partnership. However, the plaintiff had failed to prove on a balance of probabilities that the agreement was entered into upon or in anticipation of the dissolution of the partnership (see paras 48 & 50).

**[Bahasa Malaysia summary**

Defendan, seorang pengamal perubatan berdaftar, telah memeterai satu perjanjian perkongsian dengan plaintif, satu perkongsian untuk menjalankan perniagaan sebuah pusat jagaan kesihatan. Terma tersurat perjanjian tersebut yang bermula pada 1 November 2006 ialah bahawa defendan sebagai rakan kongsi tidak akan menjalankan amalan sebagai seorang pengamal perubatan dengan menubuhkan sebarang amalan perubatan oleh dirinya sendiri atau sebagai seorang rakan kongsi atau sebagai seorang pekerja dalam lingkungan 15km daripada mana-mana cawangan plaintif dalam tempoh tiga tahun selepas beliau berhenti menjadi rakan kongsi plaintif. Pada 5 Februari 2007, defendan menyerahkan surat perletakan jawatannya dan menarik diri sebagai rakan kongsi plaintif bermula daripada 5 Mei 2007. Sekitar April 2007, defendan berhenti bekerja untuk plaintif dan bekerja sebagai pengamal perubatan di klinik lain yang berada dalam lingkungan 15km daripada satu daripada cawangan-cawangan plaintif. Plaintif memfailkan tindakan ini terhadap defendan. Melalui tindakan ini plaintif menuntut satu injunksi kekal untuk menghalang defendan daripada bekerja sebagai pengamal perubatan dalam lingkungan 15km daripada tiga cawangan plaintif di Johor dan ganti rugi. Pada tarikh perbicaraan yang ditetapkan selepas 4 Mei 2010, rayuan plaintif untuk satu injunksi kekal menjadi tidak relevan dan relief terhad kepada tuntutan plaintif untuk ganti rugi. Hujahan plaintif ialah bahawa defendan telah melanggar klausa halangan dagangan dalam perjanjian perkongsian. Defendan menghujah bahawa klausa halangan dagangan adalah terbatal dan tidak boleh dikuatkuasakan memandangkan ia bercanggah dengan s 28 Akta Kontrak 1950 ('Akta'). Dalam balasannya, plaintif menghujah bahawa perjanjian tersebut terangkum di bawah Pengecualian 2 s 28 Akta, bahawa perjanjian tersebut dibuat selepas atau dalam jangkaan pembubaran perkongsian. Walau bagaimanapun, defendan menghujah bahawa pengecualian 2 s 28 Akta tidak terpakai kepada kes ini di mana seorang rakan kongsi tunggal meninggalkan perkongsian dan perkongsian tersebut masih diteruskan.

**Diputuskan**, menolak tuntutan plaintif dengan kos RM8,000:

(1) Pengecualian 2 kepada s 28 Akta bermaksud untuk meliputi dua keadaan, iaitu selepas pembubaran sebuah perkongsian atau dalam jangkaan pembubaran sebuah perkongsian. Sama ada perjanjian tersebut dibuat selepas atau dalam jangkaan pembubaran perkongsian merupakan satu persoalan fakta yang perlu ditentukan berdasarkan

keterangan yang dikemukakan. Maksud literal frasa 'pembubaran perkongsian' ialah penamatan rasmi sebuah perkongsian. Adalah jelas bahawa ss 34–37 Akta Perkongsian 1961 hanya memperuntukkan empat situasi di mana sebuah perkongsian boleh dibubarkan dan bahawa peruntukan-peruntukan ini tidak meliputi satu situasi di mana seorang rakan kongsi meninggalkan sebuah perkongsian dan rakan kongsi yang satu lagi kekal dan meneruskan perkongsian. Dalam keadaan ini, interpretasi plaintif mengenai frasa 'pembubaran perkongsian' tidak boleh diterima. Walaupun frasa 'pembubaran perkongsian' boleh menimbulkan dua interpretasi seperti yang dihujahkan oleh plaintif, interpretasi yang berpihak kepada defendan seharusnya digunakan (lihat perenggan 23 & 31).

(2) Hujahan plaintif bahawa apabila seorang rakan kongsi memeterai satu perkongsian, dia seharusnya menjangkakan bahawa perkongsian tersebut akan berterusan atau dibubarkan di masa hadapan adalah secara keseluruhannya tanpa merit. Seterusnya, semakan keterangan menunjukkan bahawa tujuan perkongsian tersebut ialah untuk mengakui defendan sebagai rakan kongsi sekerja dalam amalan perkongsian. Tidak terdapat apa-apa perbincangan di antara plaintif dan defendan mengenai sebarang kemungkinan perkongsian tersebut dibubarkan dalam masa terdekat ataupun apa-apa klausa khas dalam perjanjian, berkenaan dengan pembubaran amalan perkongsian. Perjanjian tersebut hanya mengenai pembatalan perjanjian di antara plaintif dan defendan tetapi bukannya pembubaran perkongsian. Seterusnya, plaintif gagal untuk memplid fakta-fakta bahawa pihak-pihak telah memeterai perjanjian perkongsian dengan jangkaan pembubaran perkongsian sama ada dalam penyataan tuntutannya ataupun dalam balasannya kepada pembelaan. Plaintif juga tidak mengemukakan keterangan mencukupi untuk membuktikan bahawa perjanjian tersebut dimeterai selepas atau dengan jangkaan pembubaran amalan perkongsian. Oleh itu, atas alasan ini sahaja tuntutan plaintif tidak boleh disokong (lihat perenggan 30, 39–41).

(3) Walaupun had kawasan yang dikenakan oleh klausa halangan dagangan dalam perjanjian adalah munasabah, kemunasabahan itu sendiri tidak mencukupi untuk menggunakan Pengecualian 2 kepada s 28 Akta. Pengecualian tersebut perlu dipenuhi bahawa perjanjian yang mengandungi klausa halangan dagangan dibuat selepas atau dengan jangkaan pembubaran perkongsian. Walau bagaimanapun, plaintif gagal untuk membuktikan atas imbangan kebarangkalian bahawa perjanjian yang dimeterai selepas atau dengan jangkaan pembubaran perkongsian (lihat perenggan 48 & 50).]

**Notes**

For cases on construction, see 3 (3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6179–6219.

For cases on dissolution, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1134–1139.

**Cases referred to**

*Deacons (a firm) v Bridge* [1984] 2 All ER 19, PC (refd)
*RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, FC (refd)

**Legislation referred to**

Contracts Act 1950 s 28, Exceptions 1, 2
Evidence Act 1950 ss 101, 103
Partnership Act 1961 ss 34, 35, 36, 37

*Pang Kong Seng (KS Pang & Co) for the plaintiff.*
*Mohd Faizal bin Ahmad (Hazelin & Associates) for the defendant.*

**Teo Say Eng JC:**

BACKGROUND

**[1]** In this case, the plaintiff is claiming against the defendant for:

(a) a permanent injunction to restrain the defendant from practising as a medical practitioner as a sole proprietor or partner or employee within the 15km radius from the plaintiff's following branches:

(i) No 63, Jalan Permas 10/11, Bandar Baru Permas Jaya, 81750 Masai, johor;

(ii) No 97, Jalan Bakawali 50, Taman Johor Jaya, 81100 Johor Bahru, Johor;

(iii) No 16, Jalan Johar 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor; and

(iv) No 19, Jalan Mawar, 81750 Masai, Johor;

(b) damages to be assessed;

(c) costs to be taxed and to be paid forthwith; and

(d) any other relief this honourable court deems fit and proper.

**[2]** The plaintiff has obtained an interpartes interim injunction against the defendant on 17 September 2007 to restrain the defendant from practising as a medical practitioner as a sole proprietor or a partner or an employee within the radius of 15km from the plaintiff's branches stated above until 4 May 2010.

The plaintiff submits that since the date of trial was fixed after 4 May 2010, therefore the prayer for permanent injunction is irrelevant and the relevant relief now is the damages.

**[3]** The plaintiff alleges that the defendant has breached cl 11(iii) of the partnership agreement entered into between the plaintiff and the defendant.

**[4]** The defendant contends that cl 11(iii) is a restraint of trade clause which has contravened s 28 of the Contracts Act 1950 and is void and unenforceable.

THE ISSUES

**[5]** The parties have agreed that the issues for adjudication are as follows:

(a) whether the current case falls under Exception 2 of s 28 of the Contracts Act 1950; and

(b) whether the plaintiff is entitled to damages.

FACTS NOT IN DISPUTE

**[6]** The plaintiff is at all material times a partnership running the business of Health Care Centre with the principal place of business at No 63, Jalan Permas 10/1, Bandar Baru Permas Jaya, 81750 Masai, Johor. The plaintiff is also running the said business at the branches of the following address:

(a) No 97, Jalan Kawali 50, Taman Johor Jaya, 81100 Johor Bahu, Johor;

(b) No 16, Jalan Johor 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor; and

(c) No 19, Jalan Mawar, 81750 Masai, Johor.

**[7]** The defendant at all material times is a registered medical practitioner, to wit, a medical doctor residing at No 73, Jalan Perwira 7, Taman Ungku Tun Aminah, 81300 Skudai, Johor.

**[8]** By the agreement dated 1 November 2006 ('P3') (pp 1–20 the plaintiff's bundle of documents 'G') entered into between the plaintiff and the defendant, the defendant had agreed to join the plaintiff as a partner commencing on 1 November 2006 for two years from the said date subject to the terms of the said agreement dated 1 November 2006.

Under cl 2(i) of the agreement, the partnership shall be deemed to have commenced on 1 November 2006. It is an express term of the said agreement

dated 1 November 2006 that the defendant as a partner shall not practise as a medical practitioner by setting up any medical practice himself or as a partner or as an employee within the radius of 15km from any of the plaintiff's branches stated above within three years after the defendant has ceased to be a partner of the plaintiff.

Clause 11(iii) of the agreement dated 1 November 2006 states that:

> No partner shall without the written consent of the Managing Partner:-
>
> (iii) set up any medical practice within three (3) years after ceasing to be partner within a radius of 15 KM from any partnership clinics as medical practitioner either by himself or as a partner or employee of any person or company;

**[9]** By the letter dated 5 February 2007 (P5) (p 51 of the plaintiff's bundle of documents 'G') the defendant had given three months notice to resign and withdraw as a partner of the plaintiff with effect from 5 May 2007 under cl 2(ii) of the agreement which reads as follows:

> The working partnership shall be extended on a yearly basis from the date of expiry. Either the managing partner or Dr. Nagadevan may terminate the partnership by giving three (3) months notice in advance to the other. If no notice of termination was given by either of them three (3) months prior to the expiry of the partnership then in such event the parties have agreed or deemed to have agreed to continue the partnership on a yearly basis period from the date of expiry subject to the same terms and conditions.

**[10]** The defendant had stopped working or had been absent from his duty since early of April 2007 and he had practised as a medical practitioner at Klinik Medic Care at No 30, Jalan Johor 3/2, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor within the radius of 15km from one of the plaintiff's branches at No 16, Jalan Johor 3, Taman Desa Cemerlang, 81800 Ulu Tiram, Johor. This is shown in the letter dated 6 November 2007 from the Kementerian Kasihatan Malaysia (P6) (pp 26–27 the plaintiff's bundle of documents 'G').

## EVALUATION OF ISSUES FOR DETERMINATION

**[11]** Whether the current case falls under Exception 2 of s 28 of the Contracts Act 1950:

(a) it is not in dispute that cl 11(iii) of the partnership agreement which restrained the defendant from setting up any medical practice within three years after ceasing to be a partner within a radius of 15km from any partnership clinics as medical practitioner either by himself or as a partner or employee of any person or company is a restraint of trade clause which is void and unenforceable under s 28 of the Contracts Act

1950. However, the plaintiff submits that such an agreement falls under Exception 2 of s 28 of the Contracts Act 1950. For ease of reference, I shall set out below s 28 of the Contracts Act 1950 together with its Exceptions 1 and 2:

> Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.
>
> *Saving of agreement not to carry on business of which good will is sold*
>
> Exception 1 — One who sells the goodwill of a business may agree with the buyer to refrain carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the court reasonable, regard being had to the nature of the business, of agreement between partners prior to dissolution
>
> Exception 2 — Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1.

(b) in order to invoke Exception 2 to s 28 of the Contracts Act 1950, the following requirements must be complied with:

(i) *Partners*
Exception 2 only applies to an agreement made between partners. The defendant must be a partner at the time of the execution of the partnership agreement.

(ii) The restrictive covenant must be made *upon* or *in anticipation of* a dissolution of the partnership.

(iii) *Within such local limits as are referred to in Exception 1*
The validity of the restraint of trade clause is subject to the reasonableness test as envisaged by the use of the words 'within such local limits as are referred to in Exception 1.

(c) *The Burden of Proof*
Since the plaintiff alleges that the current case falls under Exception 2 of s 28 of the Contracts Act 1950, the burden of proof rests with him under ss 101 and 103 of the Evidence Act 1950.

*First requirement*

**[12]** Whether the defendant was a partner at the time of the execution of the partnership agreement exh P3.

**[13]** The plaintiff submits that the word 'partners' should include those who become such upon execution of the partnership agreement.

**[14]** The moment the defendant executed the agreement, he has become a partner of the firm (the plaintiff) and the agreement is binding on him. The plaintiff further submits that it makes no sense to say that the defendant was not yet a partner of the firm when he executed the agreement. This is further strengthened by cl 2(i) of the agreement:

> The new partnership shall be deemed to have commenced on the 1st day of November, 2006 and shall continue for a term of two (2) years from that date. At the end of the said two (2) year term, the partnership shall continue on yearly basis.

**[15]** I agree with the plaintiff's submission and hold that the defendant falls under the word 'partners' in Exception 2 of s 28.

*Second requirement*

**[16]** In determining whether the agreement was made upon or in anticipation of a dissolution of a partnership, it is necessary to decide whether the phrase 'dissolution of a partnership' means the whole partnership must be dissolved or one or several partners resign from a partnership and the partnership still continues as contended by the plaintiff?

**[17]** The plaintiff submits that it is not necessary that the whole partnership must be dissolved in order to invoke the said exception.

**[18]** The plaintiff submits that the defendant in this case had resigned/withdrawn as a partner of the plaintiff's firm.

**[19]** Although the plaintiff was not been dissolved pursuant to cl 26 of the agreement ('P3') and because apart from the defendant, there are other partners remained. The plaintiff therefore submits that as far as the defendant is concerned, the partnership between the defendant and the other partners was dissolved.

**[20]** The defendant in reply submits that Exception 2 only applies in specific circumstances (where the existing partners knew or having knowledge that the Partnership Practice will be dissolved, entered into an agreement not to compete with one another) but it does not apply where a single partner leaves the partnership and the partnership still continues.

*Ruling by the court*

**[21]** In interpreting the phrase 'dissolution of partnership' a literal approach

should be adopted. The word 'dissolution' as defined in *Collins Cobuild English Dictionary* to mean: 'the act of officially ending a formal agreement, for example a marriage or a business arrangement'. The literal meaning of 'dissolution of partnership' clearly means that the official ending of a partnership. Dissolution of partnership and its consequences are governed by ss 34– 37 of the Partnership Act 1961. The Act only provides four situations where a partnership can be dissolved, namely:

(a) dissolution by expiration or notice;

(b) dissolution by bankruptcy, death or charge;

(c) dissolution by illegality of partnership; and

(d) dissolution by the court.

**[22]** It is clear that these provisions that is ss 34 –37 of the Partnership Act 1961 do not cover a situation where a partner leaves a partnership and the other partners remain and the partnership continues. In the circumstances, the interpretation of the phrase 'dissolution of partnership' by the plaintiff, is therefore not acceptable.

**[23]** Even if the phrase 'dissolution of a partnership' could give rise to two interpretations as contended by the plaintiff I am still of the view that the phrase should be read contra proferentum the plaintiff who relied upon the said clause and the interpretation which is favourable to the defendant should be adopted.

**[24]** Be that as it may, I am still of the view that the plaintiff must still prove on the balance of probabilities from the evidence adduced that the said agreement was entered into upon or in anticipation of a dissolution of partnership. The word 'anticipate' means 'to think that something will probably happen or to guess that something will happen and be ready to deal with it'.

**[25]** The phrase 'in anticipation of something' if you do something in anticipation of an event, you expect it to happen and you prepare yourself for it.

**[26]** See *Macmillan English Dictionary for Advanced Learners*.

**[27]** Applying the above meanings to our present case, 'in anticipation of the dissolution of a partnership' clearly means that you expect that a dissolution of the partnership will probably happen and you prepare yourself for it.

**[28]** Whether or not the partnership agreement in this case was entered into

between the plaintiff and the defendant upon or in anticipation of the dissolution of the partnership is a question of fact to be determined from the evidence adduced.

*The plaintiff's submission*

(a) The plaintiff submits that the parties have anticipated a dissolution of the partnership when they signed the partnership agreement which can be seen from the evidence adduced through SP1 that is Dr Yap Cheng Kwee. The plaintiff points out that Dr Yap Cheng Kwee (SP1) who has signed the agreement (P3) told the court that the intention to put the cl 11(iii) in the agreement (P3) was that all parties were to understand that upon admission of the defendant as a new partner of the plaintiff, the defendant should not set up any form of practice as a medical practitioner by himself or as a partner or employee or any person or company within 15km radius from any branches of the plaintiff for three years after ceasing to be a partner;

(b) the plaintiff further submits that cl 2(ii) of the (P3) provides that either party may terminate the agreement by giving three months notice. This clearly shows that termination or dissolution was in the mind of the parties/partners upon execution of the agreement (P3); and

(c) the plaintiff further submits that the fact that dissolution was in the mind of the parties was further strengthened by the evidence of DW1 when DW1 told the court that he agreed when a partnership was formed, the inevitable consequence in years to come was either the partnership subsisted or the partnership dissolved. He also agreed that naturally that was within the contemplation of all partners when a partnership was formed.
He further agreed that when a partner entered into a partnership or signed a partnership agreement, he would have anticipated that the partnership would continue or the partnership would dissolve in the future.

*The defendant's submission*

**[29]** The defendant submits that the plaintiff has failed on the balance of probabilities to prove its assertion that exh P3 was entered into in anticipation of the partnership practice being dissolved based on the evidence adduced in court.

Evidence adduced

(a) During the trial, the plaintiff's sole witness ('SP1'), had admitted under cross-examination that exh P3 was the only partnership agreement signed by the parties;

(b) under cross-examination ('SP1') further admitted that the purpose of the partnership agreement (exh P3) was to admit the defendant as a working partner of the partnership practice;

(c) this fact is supported by the presence of cl 6 of the recital to exh P3 that reads:

> (6) The old Partners are willing to admit Dr. Nagadevan as a working partner of the Partnership Practice and Dr. Nagadevan has agreed to be the working partner of the said partnership practice subject to the terms and conditions hereinafter contained [the partners in the new partnership are referred to as the partners.

(Refer to p 2 of bundle G)

(d) in his testimony, the defendant in his witness statement had told this honourable court, inter alia, that:

> 8(Q) Apart from admitting you as a new working partner, did Dr. Yap Cheng Kwee or any of the other old partners inform you at that material time of any other reasons for entering into the Partnership Agreement?
>
> A Yang Arif, no other reasons were offered at that point in time. I believe that the only reason for doing so was to admit me as a new partner of the plaintiffs Partnership Practice.
>
> 9(Q) Dr. Naga, was there any indication at that point in time that the parties were alluding to the possibility of the Partnership Practice being dissolved sometime in the near future?
>
> A Certainly not, Yang Arif, otherwise I would not have joined a Partnership Practice or rather agreed to become its new partner knowing full well that it was about to be dissolved in not too distant a future.

(Refer to Q&A (8)–(9) of J)

In the same vein, the defendant also told this court during re-examination that:

> … when we signed the agreement it was just the beginning of the Partnership. The entire firm was formed 2 weeks before I joined in as a partner. And during the signing of the agreement the main discussion was expansion of the partnership by bringing in new partners and opening up of new clinics. I was told if in case there is any problem with the partnership I was supposed to manage all the clinics. So there was no discussion about dissolution at all.

*Finding by the court*

**[30]** Having considered the submissions by the respective parties I find that

the plaintiff's submission that when a partner entered into a partnership or signed a partnership agreement he could have anticipated that the partnership would continue or the partnership would dissolve in the future is totally without merits. If such a view was correct, it would mean that all partnership agreements were deemed to have made in anticipation of the dissolution of partnership whenever every partner who entered into a partnership agreement could have anticipated that the partnership would continue or the partnership would dissolve in future.

**[31]** I am of the considered view that Exception 2 to s 28 of the Contracts Act 1950 is meant to cover two situations, that is:

(a) upon the dissolution of a partnership; and

(b) in anticipation of a dissolution of a partnership.

**[32]** Whether the agreement was made upon or in anticipation of the dissolution of partnership is a question of fact to be determined on the facts adduced.

**[33]** A perusal of the evidence adduced shows the following:

(a) the purpose of the partnership agreement was to admit the defendant as a working partner of the partnership practice;

(b) there was no discussion between the plaintiff and the defendant of any possibility of the partnership being dissolved in the near future;

(c) exh P3 does not contain a specific clause which deals with the dissolution of the partnership practice;

(d) cl 2(ii) of the partnership agreement only governs the termination of the partnership agreement between the plaintiff and the defendant but not the dissolution of the partnership. From the evidence adduced, I find that there was not an iota of evidence that this partnership agreement was made in anticipation of the dissolution of the partnership practice then or in the near future. Neither any such inference can be drawn from the facts adduced that the parties expected that the dissolution of the partnership would probably happen and they had prepared for it at the time of the execution of the partnership agreement; and

(e) on the issue whether the plaintiff specifically pleaded facts that bring this case within the Exception 2 of s 28 of the Contracts Act 1950?.

**[34]** The defendant contends that the statement of claim does not plead facts which bring or support its claim that the parties had entered into exh P3 in anticipation of the partnership practice being dissolved.

**[35]** It is trite law that the parties are bound by their own pleadings: see *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 at p 190.

**[36]** The plaintiff in reply argues that the plaintiff has pleaded the existence and effect of the agreement (P3) at paras 3–4 of the statement of claim.

**[37]** The plaintiff further submits that to determine whether the parties were in anticipation of a dissolution of the partnership when the agreement was signed, the court has to probe into the state of mind of the parties.

**[38]** This is a matter of evidence for the court to consider which need not be pleaded.

*Rulling by the court*

**[39]** I agree with the submission of the defendant that the plaintiff has failed to plead facts that the parties had entered into P3 in anticipation of the partnership practice either in his statement of claim or in his reply to the defence.

**[40]** Be that as it may, I find that neither did the plaintiff adduce sufficient evidence to prove that such an agreement was entered into upon or in anticipation of the dissolution of the partnership practice.

**[41]** I therefore find that on this ground alone that the plaintiff's claim is unsustainable.

*Third requirement*

Whether the local limits imposed by the restrictive covenant was reasonable in the circumstances with regard to the nature of the business

The plaintiff's submission

**[42]** The plaintiff submits that in the current case, the territory limit is only within 15km radius from the plaintiff's branches and duration is only for three years.

**[43]** The plaintiff cited the Privy Council's decision in *Deacons (a firm) v Bridge* [1984] 2 All ER 19 (pp 15–22 the plaintiff's bundle of authorities) which has a similar facts to support its contention.

**[44]** In *Deacon*'s case, the plaintiff was a firm of solicitors in Hong Kong with 27 partners. The defendant was one of the partners of the plaintiff's firm. The partnership agreement contained a restrictive covenant which states that if a partner ceased to be a partner, he was not to act as a solicitor in Hong Kong for a period of five years for any client of the firm or any person who had been a client in the three years preceding his departure from the firm. In 1982, the defendant resigned as a partner and set up a practice in Hong Kong which he commenced acting for former clients of the plaintiff who sought an injunction to enforce the restrictive covenant.

**[45]** The High Court granted the injunction. The injunction was upheld by the Court of Appeal.

**[46]** The Privy Council applied the 'reasonableness test' and upheld the injunction and ruled that the scope and duration of the restraint of trade was not unreasonable. Whereas in the Privy Council case, the territory limit is the whole Hong Kong and the duration is for five years.

**[47]** This clearly shows that the limit imposed by cl 11(iii) is reasonable.

**[48]** Based on the authority cited, I agree that the territory limit imposed by cl 11(iii) is reasonable. However, being reasonable by itself is not enough to invoke Exception 2 to s 28, it must be satisfied that the agreement which contains the restraint of trade clause must be made upon or in anticipation of the dissolution of the partnership practice which the plaintiff had failed to prove on the balance of probabilities.

*Issue No 2*

**[49]** Since I have decided the first issue in the negative, the answer to the second issue will also be in the negative.

DECISION

**[50]** From the evidence adduced in totality, I find that the plaintiff has failed to prove its claim on the balance of probabilities against the defendant. In the circumstance, I dismiss the plaintiff's claim with cost of RM8,000.

*Plaintiff's claim dismissed with costs of RM8,000.*

Reported by Kohila Nesan